# RECENT DECISIONS.

EDWARD W. WALKER, *Editor-in-Charge.*

ACCOUNT—JURISDICTION OF EQUITY—FIDUCIARY RELATIONSHIP.—The complainant purchased of the defendant land in his possession which he was cultivating with share croppers. The parties agreed that the defendant should make settlements with his croppers, superintend the gathering of the crop, and turn over the proceeds. Defendant disregarded his obligations, and refused to give an accounting of his stewardship, the details of which rested within his knowledge. *Held,* since the relationship partakes of a fiduciary nature, the defendant must account. *Phillips* v. *The Birmingham Industrial Co.* (Ala. 1909) 50 So. 77.

The bill for account will lie, where there are mutual accounts between the parties, *Phillips* v. *Phillips* (1852) 9 Hare 471; *Hay* v. *Marshall* (Tenn. 1842) 3 Humph. 623, where the accounts are complicated, *Governor* v. *M'Ewen* (Tenn. 1844) 5 Humph. 241; *Wilson & Co. et al* v. *Riddle* (1873) 48 Ga. 609, or where there is a fiduciary relation between the parties. *Warren* v. *Holbrook* (1893) 95 Mich. 185; *Makepeace* v. *Rogers* (1865) 11 Jur. Pt. 1 [N. S.] 215, 314. A court of law by means of referees has relieved equity of the necessity of interference under the first two conditions. *Marvin* v. *Brooks* (1883) 94 N. Y. 71. The mere relation of principal and agent is insufficient ground for accounting, *Moxton* v. *Bright* (1869) L. R. 4 Ch. 292; *King* v. *Rossett* (1827) 2 Younge & J. 33, but if the relationship acquires a fiduciary nature equity will take jurisdiction, *Marvin* v. *Brooks supra,* the relation becoming such when the principal, confiding in the agent, places property in his hands, to be managed in his discretion, and the details of which rest within his knowledge. *Marvin* v. *Brooks supra; Thornton* v. *Thornton* (Va. 1878) 31 Gratt. 212; *Pratt* v. *Tuttle* (1884) 136 Mass. 233. The principal, on the other hand, is generally under no duty to account to the agent since there is no trust or confidence reposed in him, *Padwick* v. *Stanley* (1852) 9 Hare 627; *Dinwiddie* v. *Bailey* (1801) 6 Ves. 136, except where he has received sums upon which the agent is entitled to commissions. *Alpaugh* v. *Wood* (1888) 45 N. J. Eq. 153; *Channon* v. *Stewart* (1882) 103 Ill. 541; *contra, Smith* v. *Leveaux* (1863) 2 De Gex, J. & S. 1. Since all the elements of a fiduciary relationship appear in the principal case, an account is properly granted.

ADMIRALTY—TOWAGE—CONTRACT EXEMPTION FROM NEGLIGENCE.—By the contract of towage, the tow was to assume all risks. Due to the tug's negligence, the tow became a total loss. *Held,* Coxe J. dissenting, the contract released the tug from all liability for her negligence. *The Oceanica* (1909) 170 Fed. 893.

A common carrier cannot exempt itself from responsibility for its negligence. 9 COLUMBIA LAW REVIEW 632. Where tugs are considered common carriers, *Bussey & Co.* v. *Miss. Valley Trans. Co.* (1872) 24 La. Ann. 165, it follows, therefore, that they cannot thus exempt themselves. While the weight of modern authority does not so regard them, but merely imposes the duty of due care, *The Margaret* (1876) 94 U. S. 494, the American decisions are unanimous in holding that tugs cannot exempt themselves from liability for their negligence, *The Syracuse* (1870) 12 Wall. 167; *Ulrich* v. *The Sunbeam* (1878) Fed. Cas. No. 14329, as the principal case admits. This appears sound, for the same reason invalidating contract exemptions for negligence in the case of common carriers, namely, that such exemptions amount to a denial and repudiation of duties which are the very essence of their employment, *Louisville Ry. Co.* v. *Faylor* (1890) 126 Ind. 126, would seem to apply to tug boats. The duty to exercise due care is of the essence, because it is a positive duty imposed by law, and not by contract, *The M. J. Cummings* (1883) 18 Fed. 178, the breach of which would of necessity be peculiarly dangerous to the lives

and property of others, since the tow, being without motive power, is at the mercy of the tug. *Cf. Vanderslice* v. *The Superior* (1850) Fed. Cas. No. 16843. An additional reason is found in the fundamental principle of admiralty law, by which a ship is personified, and is liable for her torts in an action *in rem*. *United States* v. *Malek Adhel* (U. S. 1844) 2 How. 210, 234. This is a development and outgrowth of the law of deodands, Holmes, The Common Law, 24 *et seq.*, whereby the thing doing the wrong is absolutely forfeit, not because of any default in the owner, but because it did the act. Doctor & Student 290. In view of the settled state of the law, which appears sound on principle, it would seem that the decision of the principal case is inexpedient.

BAIL—RENDITION—EXTRADITION.—The day before a trial in which his whole fortune was involved and in which he was plaintiff, the petitioner was arrested on an extradition warrant from Canada on the charge of larceny. *Held,* in view of such hardship, the court was justified in enlargening him on bail until the completion of that suit. *In re Mitchell* (1909) 171 Fed. 289.

By the common law all offences were bailable, *King* v. *Marks* (1802) 3 East 157, though not of right, but as a matter of judicial discretion. *Anon.* (1731) 2 Barnardston K. B. Rep. 43; *Ex parte McAnally* (1875) 53 Ala. 495. In the United States, in all except capital offenses where the proof is evident or the presumption of guilt great, bail is generally a matter of constitutional right. *State of Ohio* v. *Summons* (1850) 19 Oh. St. 139; *State* v. *Wiley* (1870) 64 N. C. 821. In cases of rendition, *Ex parte Erwin* (1879) 7 Tex. App. 288, and extradition, *In re Carrier* (1893) 57 Fed. 578, however, there is no such right, but since the power to bail is incident to the power to hear and determine, *People* v. *VanHorn* (N. Y. 1850) 8 Barb. 158, it would seem that in these cases, bail may be granted in the discretion of the court unless the statute under which the court proceeds denies it. This result has been reached in England in actions arising under the Fugitive Offenders Act. *Queen* v. *Spilsbury* L. R. [1898] 2 Q. B. 615. In this country, in rendition proceedings bail is generally refused, although it does not appear whether in the exercise of discretion or not. *In re Foye* (1899) 21 Wash. 250; *Ex parte Erwin supra.* In extradition cases, the power to grant bail after committal is denied by statute, *Wright* v. *Henkel* (1903) 190 U. S. 40, and when application is made before committal, it has been refused because no power was expressly given by the act of 1849. *In re Wright* (1903) 123 Fed. 463; *In re Carrier supra.* These decisions, it is submitted, are incorrect in denying any discretionary power in the court to admit to bail. *Queen* v. *Spilsbury supra;* see *Wright* v. *Henkel supra.* Granting its existence, however, it should be exercised with great caution in view of possible international complications, *Wright* v. *Henkel supra,* and since in ordinary cases, alleged financial ruin by reason of confinement has been held insufficient cause for enlargement, *Hall* v. *State* (1886) 64 Miss. 431, the principal case goes rather far.

BANKRUPTCY—SECURED CREDITORS—MARSHALLING ASSETS.—A secured creditor, having liquidated the collateral after the debtor's bankruptcy, claimed the right to marshall the assets, in the first instance, upon the interest accruing subsequent to the fiat. *Held,* he was entitled to do so. *In re Kessler & Co.* (1909) 171 Fed. 751.

The law in England is well settled that where the collateral proves insufficient, a secured creditor may not marshall the assets first upon interest arising subsequent to the bankruptcy. *Quartermaine's Case* L. R. [1892] 1 Ch. 639. However dubious may have been the inception of this rule, *Ex parte Badger* (1798) 4 Ves. Jr. 164, and in the face of the inconsistencies it has led to, *Ex parte Penfold* (1851) 4 De Gex & Sm. 282, it has but recently been judicially declared that, were the matter one of first impression, the same rule would obtain, on the theory that bankruptcy stops all things at the date thereof. *In re Savin* (1872) L. R. 7 Ch. App. 760. Consequently, interest accruing after the fiat is not provable, and a creditor,

secured or unsecured, could never prove for more than principal and interest at the date of the commission. *In re Talbot* (1888) L. R. 39 Ch. Div. 567. The general rule, however, is that a secured creditor, having a provable and an unprovable claim, may marshall the proceeds of the security first upon the latter. *Ex parte Arkley* (1791) 1 Cooke B. L. (4th ed.) 123; *Ex parte Hunter* (1801) 6 Ves. Jr. 94. The analogy between interest arising subsequent to bankruptcy and unprovable claims seems perfect, 2 Mont. & A., Bankr. Cases, App. A., and the principal case in allowing the creditor to apply the proceeds of his security to such interest, does not violate the theory of bankruptcy. Where a secured creditor has collateral sufficient to cover principal and interest to the date of the liquidation, he is entitled to both; whether or not the debtor has, in the meantime, gone into bankruptcy. *Coder* v. *Arts* (1907) 152 Fed. 943. The principal case, in preserving his right to such interest, where the collateral is insufficient, seems to adopt a preferable interpretation of § 57h. Bankr. Act of 1898 (U. S. Comp. Stat. (1901) 3443), and is in accord with cases arising under an earlier, but in this respect substantially similar statute. *In re Haake* (1872) Fed. Cas. No. 5883.

BANKS AND BANKING—THEFT OF TELLER—LIABILITY OF PAYEE.—Purporting to act for an undisclosed principal who had an account in the plaintiff bank, the paying teller of that institution on repeated occasions paid large sums of money to the defendant to cover speculative losses. In fact, the teller stole the money so paid from the bank, and no undisclosed principal existed. *Held,* the plaintiff could not recover in an action for money had and received, as the defendant acted in good faith. *First Nat. Bank etc.* v. *Gibert & Clay* (La. 1909) 49 So. 593.

If money is secured on a negotiable instrument wrongfully given by an agent, the payee is liable, if from the face of the instrument he is put on inquiry as to the irregularity of the transaction, for in such circumstances he is regarded as acting in bad faith. *Cohnfeld* v. *Tanenbaum* (1903) 176 N. Y. 126. Obviously, when money itself is wrongfully transferred this rule has no application, but even where no notice appears on the face of an instrument, the payee is nevertheless liable if bad faith can be shown from the collateral facts. *Merchants' Loan & Trust Co.* v. *Lampson* (1899) 90 Ill. App. 18. While gross negligence is not sufficient in itself, *Goodman* v. *Harvey* (1836) 4 Ad. & Ell. 870, it does constitute bad faith where it amounts to a refusal to make inquiry when circumstances of grave suspicion demand it. *Lytle* v. *Lansing* (1892) 147 U. S. 59. Accordingly, when a cashier of a bank, who is also a partner, enters credits in a pass book to discharge his own indebtedness to a depositor, the latter is put upon notice and is liable for moneys paid on checks against such credits, *Hier* v. *Miller* (1904) 68 Kan. 258, since he is presumed to know the scope of the cashier's powers. *Williams* v. *Dorrier* (1890) 135 Pa. St. 445. It would not appear open to argument that a teller has no authority to pay out the bank's money except upon presentation of a check, draft, or sufficient memorandum. In the principal case, since the defendant believed that the undisclosed principal had an account in the bank, and since he knew of no check drawn by such principal, his refusal to make inquiry as to the teller's authority would constitute bad faith, as the facts would seem to show circumstances of grave suspicion within the rule of *Lytle* v. *Lampson supra.* The only authority relied upon in the principal case, *Merchants' Loan & Trust Co.* v. *Lampson supra,* seems distinguishable on its facts, since in that case it did not appear that any part of the transaction took place within the bank.

CARRIERS—CONFISCATORY RATES—SPARSELY SETTLED COUNTRY.—The legislature passed a schedule of maximum freight rates, which allowed no immediate profit to a railroad which ran through a sparsely settled country. *Held,* such rates were not necessarily confiscatory. *Southern Pacific Co.* v. *Bartine* (1909) 170 Fed. 725.

While at one time it was considered that a rate was reasonable if it

gave *some* compensation, the rule is now firmly established, that it must give a fair and adequate return, *Stanislaus County* v. *San Joaquin C. & I. Co.* (1903) 192 U. S. 201, 213; 9 COLUMBIA LAW REVIEW 273, on the reasonable value of the property at the time it is being used for the public. It cannot, however, be more than the services are reasonably worth. *Smyth* v. *Ames* (1897) 169 U. S. 466, 521. Therefore, when a company has constructed a plant which is unnecessarily large, *Brunswick etc. Water Dist.* v. *Maine Water Co.* (1904) 99 Me. 371, or a portion of which is not in use, *Capital City Gas Light Co.* v. *City of Des Moines* (1896) 72 Fed. 829, 843, only the part necessary can be included in the reasonable value of the property. Likewise, where a plant has been built to supply a greater number of customers than it has been able to obtain, *San Diego Land & Town Co.* v. *Jasper* (1903) 189 U. S. 439, or a large future population, *Boise City Irr. & Land Co.* v. *Clark* (1904) 131 Fed. 415, those using, cannot be compelled to pay an exorbitant price, even though the company operate at a loss. Thus the principal case would appear sound, since the railroad was intended for a much more thickly settled district.

CARRIERS—DUTY TO DELIVER CARS BEYOND TERMINUS OF THE LINE.—The defendant carrier refused to deliver one of its loaded freight cars to a connecting carrier for further transportation. *Held,* the statute so requiring was unconstitutional as taking property without compensation. *Gulf Ry. Co.* v. *State* (Tex. 1909) 120 S. W. 1028.

At common law a carrier is not bound to furnish cars for the transportation of goods beyond its own line. *Pittsburgh R. W.* v. *Morton* (1878) 61 Ind. 539. Whether or not a connecting carrier is under a common law duty to receive loaded freight cars is in dispute. *Little Rock R. Co.* v. *St. L. Ry. Co.* (1894) 59 Fed. 400; *Mich. Central R. R. Co.* v. *Smithson* (1881) 45 Mich. 212. In any event, however, statutes may be passed imposing these correlative duties, provided they allow for due compensation. *L. & N. R. R. Co.* v. *Central Stock Yards* (1908) 212 U. S. 133; *cf. Jacobson* v. *Wisconsin R. R. Co.* (1898) 71 Minn. 519. On the one hand, it would be confiscatory to require the connecting carrier to pay car rental where it has empty cars for the service. *Oregon Ry. Co.* v. *N. P. R. R. Co.* (1892) 51 Fed. 465. On the other, it has been intimated that the paramount needs of the initial carrier must be respected. *L. & N. R. R. Co.* v. *Central Stock Yards supra.* Indeed, it would seem that the difficulty of finding a measure of compensation, has induced some courts to deny the common law duty to receive loaded cars. *Oregon Ry. Co.* v. *N. P. R. R. Co. supra.* Where, as in the principal case, the initial carrier requires all its cars for service on its own line, car rental would be inadequate as to it, but a greater charge would be confiscatory as to the connecting carrier. It is submitted that if provision can be made for the return of cars, their temporary interchange would be a mutually satisfactory arrangement, provided considerations of expediency and public interest warrant an exception to the general rule that in eminent domain proceedings payment must be made in money. 2 Lewis, Eminent Domain (2nd ed.) § 460. The paramount needs of the initial carrier would be protected, and no hardship to the connecting carrier would result, as it is its common law duty to supply cars for offered freight. In the principal case the statute makes no provision for compensation, and as judicial legislation cannot cure this defect, *L. & N. R. R. Co.* v. *Central Stock Yards supra;* but see *Burlington Ry. Co.* v. *Dey* (1891) 82 Ia. 312, the decision is correct. See 9 COLUMBIA LAW REVIEW 445.

CONSTITUTIONAL LAW—FEDERAL LAW IN STATE COURTS—POWER OF CONGRESS TO COMPEL.—An action on the Employers' Liability Act was brought in a Connecticut court. *Held,* the court had no jurisdiction, since Congress neither intended State courts to entertain jurisdiction of the action, nor could it compel them to assume it. *Hoxie* v. *N. Y., N. H. & H. R. R. Co.* (Conn. 1909) 73 Atl. 754. See Notes, p. 711.

CONSTITUTIONAL LAW—POLICE POWER—NON-INTOXICATING LIQUORS.—A statute prohibited the sale of all beverages containing maltose, a non-intoxicating constituent of malt liquors. *Held,* the enactment was a valid exercise of the police power, since it rendered evasions of a statute against selling malt liquor less likely. *Elder* v. *State* (Ala. 1909) 50 So. 371.

While the prevention of fraud on the public through the sale of inferior and imitation goods is a well recognized field for the exercise of the police power, *People* v. *Wagner* (1891) 86 Mich. 594; *State* v. *Marshall* (1888) 64 N. H. 549, a different situation is encountered when one statute is enacted merely to prevent the evasion of another. Here prevention of fraud on the state is the object, and though every possible presumption is to be made in favor of the legislative determination of the statute's propriety, *Powell* v. *Pa.* (1888) 127 U. S. 678, it is invalid when it bears no real and substantial relation toward the object for which the prevention is framed. *Mugler* v. *Kansas* (1887) 123 U. S. 623. In applying this test, a law prohibiting the possession of game during a closed season with the intention to sell, has been held valid as rendering the enforcement of measures for the conservation of wild fowl less difficult. *Magner* v. *People* (1881) 97 Ill. 321. Also, a declaration that all liquors containing over two per cent. alcohol shall be considered intoxicating, is supported as properly ancillary to a law against the sale of actual intoxicants. *State* v. *Guinness* (1889) 16 R. I. 401. On the other hand, enactments forbidding mere possession of intoxicating beverages, regardless of whether or not they are held with intent to sell, are said to have no reasonable relation to the prevention of traffic in them. *State* v. *Williams* (1908) 146 N. C. 618. The principal case arises in a jurisdiction strongly favoring ancillary regulations, *Feibelman* v. *State* (1901) 130 Ala. 122, and affords a striking example of the extent to which they may validly go.

CORPORATIONS—NOTICE—WHEN IMPUTABLE TO THE CORPORATION.—A refrigerator company, when sued for the infringement of a patent, set up an equitable estoppel against the plaintiff corporation. The facts constituting the estoppel were brought home to some of the corporators. *Held,* the defense was invalid, as all the corporators must have notice to bind the corporation. *Seeger Refrigerator Co.* v. *Amer. Car and Foundry Co.* (1909) 171 Fed. 416.

As a corporation can act only through agents, rules of agency generally are applicable when notice is charged against it. Notice acquired by an ordinary agent within the precise scope of his authority binds the company, *Conant Ellis & Co.* v. *Seneca County Bank* (1853) 1 Oh. St. 298, and knowledge obtained by a single director officially engaged, *Bank of U. S.* v. *Davis et al.* (N. Y. 1842) 2 Hill 451, has the same effect. Ordinarily notice, not acquired officially, but privately by a president, *U. S. Ins. Co.* v. *Shriver et al.* (1851) 3 Md. Ch. 381, or an officer, *Nat. Bank* v. *Norton* (N. Y. 1841) 1 Hill 572; *Texas Banking etc. Co.* v. *Hutchins* (1880) 53 Tex. 61, is not imputable to the corporation; but it may be when given to an officer for the express purpose of being communicated. *Boyd et al.* v. *Chesapeake & Ohio Canal Co.* (1860) 17 Md. 195. Individual members of a corporation, unlike members of a general partnership, are not agents of the company unless expressly made so. *Dana* v. *Bank of U. S.* (Pa. 1843) 5 Watts. & S. 223 at 245. Obviously then, notice to one or more unauthorized corporators, *Mercantile Natl. Bank* v. *Parsons* (1893) 54 Minn. 56, or stockholders, is their knowledge alone. *Housatonic Bank etc.* v. *Martin et al. Adm.* (Mass. 1840) 1 Metc. 294. Where knowledge, actual or constructive, is brought home to every member of the corporation, however, it is notice to the corporation, *Simmons Creek Coal Co.* v. *Doran* (1892) 142 U. S. 417, 435, as to hold otherwise would be too harsh an application of the entity theory.

COURTS—ATTORNEYS—RIGHT TO DISBAR.—The respondent had issued a pamphlet in which he severely criticised the past decisions, and impugned the integrity of a judge who was a candidate for re-election. The judge, however, had himself voluntarily first put his character and conduct in issue

by publications asserting his freedom from corporate influence. *Held,* the attorney's conduct showed moral turpitude and lack of due respect sufficient to justify disbarment. *In re Thatcher* (Ohio 1909) 89 N. E. 39. See notes, p. 722.

CRIMINAL LAW—ACCOMPLICE—RIGHTS AS STATE'S EVIDENCE.—An accomplice having turned state's evidence under an agreement with the prosecuting officer that he would be immune, was later tried. *Held,* the prosecuting officer should enter a *nolle prosequi,* or on his failure to do so, the court would continue the cause until the prisoner could apply for a pardon. *Lowe* v. *State* (Md. 1909) 73 Atl. 637.

An accomplice is a competent witness, *United States* v. *Lancaster* (U. S. 1841) 2 McLean 431, and may be used, at the discretion of the prosecuting officer, *Runnels* v. *State* (1873) 28 Ark. 121, or in some jurisdictions, of the court, *People* v. *Whipple* (N. Y. 1827) 9 Cow. 707, wherever the necessities of the case demand it. *United States* v. *Lee* (U. S. 1846) 4 McLean 431. So testifying, there is an express or an implied agreement that he will not be prosecuted, *United States* v. *Ford* (1878) 99 U. S. 594, whether the accused be convicted or acquitted. *United States* v. *Lee supra.* To make this agreement effectual, however, he must testify truthfully, and fully to all he knows, *Rex* v. *Rudd* (1775) Cowper 331, even as to his own guilt. *Lockett* v. *State* (1879) 63 Ala. 5. A refusal to testify, invalidates the agreement, and if the confession is obtained upon a promise of immunity, it may be used against him, *United States* v. *Hinz* (1888) 35 Fed. 272, but not, if made with a view to securing such promise. *Commonwealth* v. *Knapp* (Mass. 1830) 10 Pick. 477. Such an agreement, however, gives rise to no legal right which may be pleaded in bar, *United States* v. *Ford supra,* except where effected by statute, *Bowden* v. *State* (1876) 1 Tex. App. 137, and only establishes an equitable right to the mercy of the court. This is generally given, either by allowing a plea of a lesser crime, *State* v. *Graham* (1879) 41 N. J. L. 15, acquittal, *Regina* v. *Owen* (1839) 9 Car. & P. 83, *nolle prosequi,* by the prosecuting officer, *Lindsay* v. *State* (1875) 63 N. Y. 143, or conviction and continuance of the cause until a pardon may be applied for. *United States* v. *Lee supra;* see *United States* v. *Blaisdell* (1869) 3 Ben. 133; *Runnels* v. *State* (1873) 28 Ark. 121. The relief allowed in the principal case is therefore correct.

CRIMINAL LAW—LARCENY—*Lucri Causa.*—The defendant was indicted for larceny. *Held,* felonious intent was not necessarily an intent to gain an advantage for the taker. *Canton Nat. Bank* v. *Am. Bonding & Trust Co.* (Md. 1909) 73 Atl. 684.

Blackstone says that to constitute larceny, "the taking must be felonious, or as the civil law expresses it, *lucri causa.*" 4 Bl. Com. (13th ed.) 232. To the same effect are the definitions given by East. 2 East P. C. Ch. 16, § 2. But it is to be noted that neither Coke, 3 Inst. 107, nor Bracton, 2 Br. (Twiss ed.) 508, include the idea of *lucri causa.* The earliest decisions seem to hold that an intent to convert the goods to the defendant's own use is essential. *Reg.* v. *Phillips* (1801) 2 East P. C. 662; *State* v. *Self* (N. C. 1792) 1 Bay 242. It has been suggested, however, that this idea may have been introduced to mark the distinction between larceny and a mere taking for temporary use, *People* v. *Woodward* (N. Y. 1883) 31 Hun 57 (dissenting opinion), or that since intent is always necessary, it is naturally stated in the form of self regarding intent. Holmes, Common Law 73. Even as early as 1815 it was held by a divided court that the doctrine of *lucri causa* was not a part of the common law, *Rex* v. *Cabbage* (1815) Russ. & Ry. 292, and the more recent decisions both in England, *Reg.* v. *Jones* (1846) 1 Den. C. C. 188; *Reg.* v. *White* (1840) 9 C. & P. 344; *Reg.* v. *Privett* (1846) 2 C. & K. 114, and America, *Williams* v. *State* (1875) 52 Ala. 411; *People* v. *Pedro Jaurez* (1865) 28 Cal. 380, hold that an intent wholly to deprive the owner of his property is sufficient. Still there are decisions to the effect that an intent to obtain personal gain is essential. *State* v. *Gray* (1866) 37 Mo. 463. It need not, however, be a pecuniary

benefit. *State* v. *Palmer* (Del. 1902) 4 Pennew. 126. The decision of the principal case is in accord with the majority of the later cases.

ELECTIONS—USE OF VOTING MACHINES—CONSTITUTIONALITY.—The plaintiff brought action to enjoin the use of voting machines at popular elections. *Held,* a statute authorizing their use is repugnant to the constitutional provision ordaining that "all elections shall be by ballot." *State ex rel. Karlinger* v. *Board of Supervisors etc.* (Ohio 1909) 89 N. E. 33.

The right to vote is not an inherent or natural right, but is granted by the sovereign power of the state through its constitution. *Blair* v. *Ridgely* (1867) 41 Mo. 63. It follows then that the legislature has no power to enlarge or abridge the right so established, *Dells* v. *Kennedy* (1880) 49 Wis. 555; *Page* v. *Allen* (1868) 58 Pa. St. 338, and laws providing for cumulative voting, *Maynard* v. *Board of Canvassers* (1890) 84 Mich. 228, or making registration a condition to the right to vote are, therefore, generally unconstitutional. *Attorney General* v. *Common Council* (1889) 78 Mich. 545. The manner in which this right of franchise shall be exercised is, however, the subject of state legislation. *Ransom* v. *Black* (1892) 54 N. J. L. 446; 5 COLUMBIA LAW REVIEW 55. Consequently, when the state constitution has provided that elections shall be by ballot, since the principal object of such a provision is to avoid the publicity of the *viva voce* method, and to insure to the elector the advantage of absolute and inviolate secrecy, *Williams* v. *Stein* (1871) 38 Ind. 89, the legislature may provide for the use of voting machines if by their use the secrecy of the vote is still maintained. *In re McTammany Voting Machine* (1897) 19 R. I. 729; *Lynch* v. *Malley* (1905) 215 Ill. 574; *City of Detroit* v. *Board of Inspectors* (1905) 139 Mich. 548. In Massachusetts, this doctrine has been sustained even though the constitution provided for a written ballot. *Opinion of the Justices to the House of Representatives* (1901) 178 Mass. 605. The decision of the principal case is incorrect.

EQUITY—CONSTRUCTIVE TRUSTS—IDENTIFICATION OF *Res.*—A stockbroker bought stock with money furnished him by his client. This was subsequently converted by the broker. On bankruptcy, stock of a like kind, though less in amount and not bought with the proceeds of the conversion, was found in the broker's possession. *Held,* the client was entitled to have such stock delivered to him as against the creditors of the bankrupt. *In re Brown & Co.* (1909) 171 Fed. 254. See Notes, p. 716.

EVIDENCE—PHYSICIAN'S OPINION BASED ON PATIENT'S STATEMENTS—ADMISSIBILITY.—A physician, consulted for the purpose of giving expert testimony and not for treatment, offered an opinion as to the plaintiff's condition, based in part on plaintiff's statements. *Held,* the opinion was inadmissible. *Chesapeake & O. Ry. Co.* v. *Wiley* (Ky. 1909) 121 S. W. 402.

Statements made by a patient to his physician in the course of treatment are admissible as original evidence under an exception to the hearsay rule, when made as to present symptoms, *Ill. Cen. Ry. Co.* v. *Sutton* (1867) 42 Ill. 438, on the principle of desirability, as being less open to inducement of misrepresentation than the direct testimony of the party in interest. Wigmore, Evidence § 1714. Where made *post litem motam,* therefore, their admission as original evidence is questionable, *Norris* v. *Haverhill* (1888) 65 N. H. 89; *contra, G. R. & I. R. Co.* v. *Huntley* (1878) 38 Mich. 537, and when made to secure expert testimony, they are self serving, the reason for the exception disappears, and they are properly excluded. *C. & E. I. R. Co.* v. *Donworth* (1903) 203 Ill. 192. Under the latter circumstances, a physician's opinion based partly on such statements, is held inadmissible by a majority of courts, because of the inducement toward misrepresentation, *D. L. & W. R. Co.* v. *Roalefs* (1895) 70 Fed. 21; but see *C. C. C. & I. Ry. Co.* v. *Newell* (1885) 104 Ind. 264, but when introduced by both parties, the case has been distinguished, somewhat unsatisfactorily, and the opinion admitted. *Quaife* v. *C. & N. W. Ry. Co.* (1880) 48 Wis. 513. When it is clear that the opinion is substantiated by objective examination, however, the subjective statements are negligible. *Union Pac. Ry.* v. *Novak*

(1894) 61 Fed. 573. When the opinion is admissible, the patient's statements founding such opinion are likewise admissible independently of the hearsay rule, Wigmore, Evidence §§ 655, 688, 1720, and although excluded by it as original evidence. *Eckles & Brown* v. *Bates* (1855) 26 Ala. 655 (past symptoms). While therefore, the principal case correctly holds the opinion admissible, *D. L. & W. R. Co.* v. *Roalefs supra,* it errs in basing its decision on the inadmissibility of the founding statements.

INJUNCTIONS—WHEN ACTION ACCRUES ON INJUNCTION BOND.—A suit in which an injunction had issued was still pending. The plaintiff brought action on the injunction bond. *Held,* the action could be maintained. *Gray* v. *South & North Ala. R. Co.* (Ala. 1909) 50 So. 352.

The purpose of an injunction bond is to protect the defendant from any wrongful interference with his rights, and to reimburse him for all damages incurred by reason of an injunction improperly issued, High, Injunctions (2nd ed.) § 1619, and if on a final hearing it appears that there was no ground for the injunction, a right of action on the bond at once accrues to the obligee. *Tallahassee R. R. Co.* v. *Hayward* (1852) 4 Fla. 411. Moreover, if the plaintiff voluntarily abandons the suit, *Gyger* v. *Courtney* (1900) 59 Neb. 555; *Dowling* v. *Polack* (1861) 18 Cal. 626, or if it is discontinued on the death of the plaintiff, and no effort is made to revive it in the name of his legal representative, *Humfeldt* v. *Moles* (1902) 63 Neb. 448, this is, in effect, a final determination that there was no ground for the injunction, and therefore action may be maintained on the bond. This result, however, does not follow when there is a discontinuance by agreement of the parties. *Palmer* v. *Foley* (1877) 71 N. Y. 106. All these cases proceed on the theory that the right of action on the bond accrues only after a final determination that the injunction was issued without cause, and such would seem to be the logic of the rule, for even though the injunction has been dissolved by one court, it cannot be said with certainty that the condition of the bond has been broken, and that the obligor is liable, so long as there is a possibility that the injunction was properly granted. *Gray* v. *Veirs* (1870) 33 Md. 159; *Bemis* v. *Gannett* (1879) 8 Neb. 236; *Dunkin* v. *Lawrence* (N. Y. 1847) 1 Barb. 447. In the principal case the court attempts to justify its conclusion only in that it follows the doctrine to which that court is committed. *Jesse French etc. Co.* v. *Porter* (1901) 134 Ala. 302. On principle the decision seems open to criticism.

INTERSTATE COMMERCE—INTERSTATE COMMERCE COMMISSION—EXTENT OF POWERS UNDER THE HEPBURN ACT.—The Interstate Commerce Commission declared certain rates charged by the complainants to be unreasonable, and imposed lower rates. The sole ground for the action of the commission was the desire to formulate new basing lines throughout the country and to establish new rate zones. The effect of the order was to materially alter the course of freight toward different centers. *Held,* Baker J. dissenting, the power assumed by the Commission was not conferred by the Interstate Commerce Acts, and the order was hence invalid. *Chicago, R. I. & Pac. Ry. Co.* v. *Interstate Commerce Commission* (1909) 171 Fed. 680.

The Hepburn Act, Act of June 29th, 1906, C. 3591, § 4 (U. S. Comp. Stat. 1907, p. 900) authorizes the Commission to determine reasonable rates "whenever it shall be of the opinion * * * that any of the rates or charges * * * are unreasonable." The dissenting opinion, in the principal case, holds that this section gives the commission the power to declare any rate whatsoever unreasonable, and precludes inquiry by the courts as to the reasons underlying the commission's decisions, leaving to the court the mere constitutional question of whether the rates imposed by the commission are confiscatory. *San Diego Land Co.* v. *National City* (1898) 174 U. S. 739. This interpretation has been placed on similar acts by several state courts. *Steenerson* v. *Gt. Northern Ry.* (1897) 69 Minn. 353. The holding of the majority in the principal case, on the other hand, practically limits the jurisdiction of the commission to cases wherein the rates are in violation of the common law in being legally unreasonable or

unduly discriminatory. *Reagan* v. *Farmer's Loan & Trust Co.* (1893) 154 U. S. 362. Since the United States Supreme Court has applied this interpretation to the original Act of 1887, *Interstate Commerce Com.* v. *Ala. Midland Ry.* (1897) 168 U. S. 144; *Texas Pac. Ry.* v. *Interstate Commerce Com.* (1890) 162 U. S. 197, and since the Hepburn Act does not vary essentially in this respect, it is likely that the interpretation of the principal case will be upheld in declaring that the Commission cannot impose a new rate unless the old rate is first found unreasonable upon common law principles.

INTERSTATE COMMERCE—SHERMAN ANTI-TRUST ACT—STATUTE OF LIMITATIONS.—In 1909 the defendants were indicted for a conspiracy in restraint of trade. Prior to January 1904, they had entirely consummated the closing of a rival plant. In 1907 resolutions were passed by the defendant company to indemnify its president and secretary for any liability in the matter; certain letters were written by one of the defendants; and a bill for disbursements was presented by another of them to the defendant company. *Held*, the action was barred by the three year statute of limitations. *United States* v. *Kissel et al.* (C. C. S. D. N. Y. 1909) 42 N. Y. L. J. No. 26.

While at common law the offense of conspiracy is complete when the confederacy is accomplished, without any overt act, *Comw.* v. *Judd* (1807) 2 Mass. 329; *King* v. *Edwards* (1771) 8 Mod. 320, if one of several overt acts in furtherance of the conspiracy is within the period of limitation, prosecution for the conspiracy is not barred. *Comw.* v. *Bartilson* (1877) 85 Pa. St. 482; *Fire Ins. Co.* v. *State* (1897) 75 Miss. 24. Under § 5440 U. S. R. S. an overt act is necessary to make the offense indictable, but there is diversity of opinion as to whether the statute of limitations may begin to run on the commission of any subsequent overt act. *United States* v. *Bradford* (1905) 148 Fed. 413; *Lorenz* v. *United States* (1904) 24 D. C. App. 337, 388; *contra, United States* v. *Owens* (1887) 32 Fed. 534; *United States* v. *McCord* (1895) 72 Fed. 159. It is submitted that it should, if such act is to effect the purpose of a conspiracy. *United States* v. *Greene* (1902) 115 Fed. 343. If the conspiracy is consummated, however, this rule should not be allowed to operate. *Ex parte Black* (1906) 147 Fed. 832. While the action in the principal case may not properly be regarded as falling under § 5440, but to be governed by the Sherman Act, *cf. United States* v. *Thomas* (1907) 156 Fed. 897, 902, as adopting the common law, *In re Green* (1892) 52 Fed. 105, the establishment of an overt act in furtherance of the conspiracy within the statutory period is also necessary to make out the offense. *Comw.* v. *Bartilson supra.* Under either theory, the correctness of the decision in the principal case would seem to depend on whether the acts alleged in 1907 were in furtherance of the conspiracy. Since their precise nature does not appear from the report, it is possible that the decision of the principal case in regarding them as insufficient to establish guilt may be open to criticism.

JURY—RIGHT TO TRIAL BY JURY—VIOLATION OF MUNICIPAL ORDINANCE.—The State Constitution provided that, "no person shall, for any indictable offense, be proceeded against criminally by information." The defendant was summarily arrested and tried for violating a liquor ordinance passed under the "general welfare" clause of the city charter, the same act being also indictable by statute. *Held*, the ordinance was valid because the offense was purely against the city. *Costello* v. *Feagin* (Ala. 1909) 50 So. 134.

Where the city is given power to punish certain acts which are also state offenses, the right of the municipality to adopt a summary form of procedure has been denied, on the theory that, even if the act punished be merely a misdemeanor, it is nevertheless a criminal offense, in which the defendant is guaranteed the constitutional rights of an indictment and trial by jury. *Slaughter* v. *People* (Mich. 1842) 2 Doug. 334. Where only the right to trial by jury is provided for, other courts limit this doctrine by allowing summary procedure, if the defendant has the right of appeal, clogged by no unreasonable restrictions. *City of Emporia* v. *Volmer* (1874)

12 Kan. 622. The prevailing and sounder view, however, recognizes that the same act may create two distinct offenses, *Ogden* v. *City of Madison* (1901) 111 Wis. 413, and also that, since generally before the adoption of the constitution, offenses against the municipality were punished summarily, they do not come within the constitutional prohibition. *McInerney* v. *City of Denver* (1892) 17 Col. 303; *cf. Howe* v. *Treas. of Bloomfield* (1874) 37 N. J. L. 145. Since this doctrine, although not uniformly adopted, is recognized, as well where the right to pass the ordinance arises from the "general welfare" clause in the charter, *Thiesen* v. *McDavid* (1894) 34 Fla. 440; *cf. Town of Neola* v. *Reichart* (1906) 131 Ia. 493; *contra, In re Sic* (1887) 73 Cal. 142, as where it is expressly granted, the principal case is sound.

LANDLORD AND TENANT—LIABILITY FOR RENT—DESTRUCTION OF BUSINESS.—Property was leased for occupation as a saloon and not otherwise. A prohibition law was subsequently passed. In a suit for rent, the tenant defended on the ground that there was a total destruction of the premises. *Held,* the theory of the defense was correct, but the law did not work a total destruction, as non-intoxicating liquors could be sold. *O'Byrne* v. *Henley* (Ala. 1909) 50 So. 83.

It is generally stated that, since rent is a certain profit issuing out of land in compensation for its use and occupation, *Chamberlain* v. *Godfrey's Admin.* (1873) 50 Ala. 530, a destruction by fire, inevitable accident, or the public enemy, does not relieve the tenant from an express covenant to pay rent. 3 Kent Com. 466; *Cook & Co.* v. *Anderson* (1887) 85 Ala. 99. There is a limitation on this principle, however, where the entire subject matter of the lease is totally destroyed, since in this case there is nothing from which rent can issue, and therefore the lease may be terminated. *Graves* v. *Berdan* (N. Y. 1859) 29 Barb. 100; *McMillan* v. *Solomon* (1868) 42 Ala. 356 (leased rooms). The cases laying down this rule and its limitation, however, are all cases of destruction by accidental fire. In South Carolina, on the other hand, it is maintained that rent springs from a beneficial use of the premises, that a deprivation of such use, although without physical destruction, is sufficient to constitute failure of consideration, and that a tenant should be allowed to rescind. *Coogan* v. *Parker* (1870) 2 S. C. 255. This principle, however, is declared to apply only in cases of destruction by act of God or the public enemy, and not by accidental fire, as in the latter event, owing to the difficulties of proof, a tenant, by his own act, might terminate the relation. *Coogan* v. *Parker supra.* This interpretation, however, is irreconcilable with the result reached when there is a total physical destruction of the premises, *Graves* v. *Berdan supra,* and the general doctrine does not appear substantiated by the cases. The principal case is of interest in showing an adoption of the South Carolina rule in place of the general rule, which previously obtained in Alabama.

LANDLORD AND TENANT—TENANCY FROM YEAR TO YEAR—CONTINUANCE OF TERM.—The plaintiff in 1891 leased property to the defendant for five years. At the expiration of this time, the defendant held over as tenant from year to year, until in 1899, when the property was abandoned. The plaintiff in 1904 sued and recovered judgment for rent for the year 1898. The defendant pleaded this judgment in defence of an action for rent for the year 1899, on the ground that the plaintiff must unite in one action all claims due. *Held,* E. T. Bartlett J. dissenting, each year of holding over constituted a new term and a new contract which could be sued for separately. *Kennedy* v. *City of N. Y.* (N. Y. 1909) 89 N. E. 360.

Generally if a landlord accepts rent from a tenant holding over, a tenancy from year to year arises. *Belding* v. *Texas Produce Co.* (1895) 61 Ark. 377; 8 COLUMBIA LAW REVIEW 323. This is a new tenancy and is not merely a continuation of the old one, *U. M. Realty & Imp. Co.* v. *Roth* (1908) 193 N. Y. 570, although it is so regarded for purposes of distraining for rent. *Sherwood* v. *Phillips* (N. Y. 1835) 13 Wend. 479. In determining its nature, its origin is of importance. It arose, it would seem, owing to the inconveniences inherent in a tenancy at will, *Doe d.*

*Martin* v. *Watts* (1797) 7 T. R. 83, and was merely a form of this tenancy stripped of its objectionable features by providing for six months' notice, and termination only at the end of the current year. *Doe d. Shaw* v. *Porter* (1789) 3 T. R. 13. Since a tenancy at will was a continuing tenancy of indefinite period, Lit. § 68, the tenancy from year to year is likewise of a continuous nature, *Oxley* v. *James* (1844) 13 M. & W. 209, and is not merely successive independent tenancies for one year, *Cattley* v. *Arnold* (1859) 1 Johns. & H. 651, although it is true that for purposes of pleading at least, it could be so regarded by the landlord. *Tomkins* v. *Lawrance* (1839) 8 Car. & P. 729. In New York, however, where a landlord sues for rent this principle is not followed, and the holding over is regarded as a new lease commencing with each year. *Austin* v. *Strong* (1872) 47 N. Y. 679. Therefore, in the light of controlling precedent, the decision in the principal case is correct.

LIMITATIONS—FORECLOSURE OF MORTGAGE—RIGHTS OF SUBSEQUENT GRANTEES.—The plaintiff sued on a note secured by a mortgage to secure a personal judgment on the note against the maker and a foreclosure of the mortgage against the present owners of the property. The statutory period had run against the note and mortgage, but the mortgagor had been out of the state practically the entire period. The owners of the property had acquired it under tax deeds, and held for the entire statutory period. *Held,* the right to foreclose was barred as against the present owners. *Boucofski* v. *Jacobson* (Utah 1909) 104 Pac. 117. See Notes, p. 718.

PUBLIC SERVICE COMPANIES—TELEPHONE CONNECTIONS—CONTRACTS FOR LONG-DISTANCE SERVICE.—The plaintiff sought an injunction to restrain the defendant from inducing local telephone companies to enter into contracts with the defendant for long-distance connection, in violation of their exclusive contracts with the plaintiff. *Held,* the exclusive contracts were void. *U. S. Tel. Co.* v. *Central Union Tel. Co.* (1909) 171 Fed 130. See Notes, p. 714.

RECEIVERS—APPOINTMENT VACATED—LIABILITY FOR COMPENSATION.—On the plaintiff's allegations a receiver was appointed for the defendant corporation. The appointment was vacated upon appeal, as being unwarranted, and the property was returned to the defendant. *Held,* Ingraham J. dissenting, the defendant was liable for the receiver's fees as they were a charge upon the property. *Fenn* v. *Ostrander* (1909) 118 N. Y. Supp. 117.

The general rule is that the compensation of a receiver is a charge upon the funds which come into his hands, 9 COLUMBIA LAW REVIEW 265, and this is true when the appointment is made to preserve the fund for the rightful owner *pendente lite,* irrespective of the outcome of the litigation. *Hopfensack* v. *Hopfensack* (N. Y. 1880) 61 How. Pr. 498. This principle does not apply, however, where either an appointment irregularly made, *Myres* v. *Frankenthal* (1894) 55 Ill. App. 390; but see *Espuella Land etc. Co.* v. *Bindle* (1895) 11 Tex. Civ. App. 262, or an order improperly issued giving the receiver control over certain funds, *Pittsfield Nat. Bank* v. *Bayne* (1893) 140 N. Y. 321, is subsequently vacated. Some courts in the exercise of their discretion apportion the compensation. *French* v. *Gifford* (1871) 31 Ia. 428. Others, considering it as costs, charge it against the unsuccessful party. *Moyers* v. *Coiner* (1886) 22 Fla. 422; *City of St. Louis* v. *St. Louis Gas Light Co.* (1881) 11 Mo. App. 237. Still others reach the same result, regarding it as equitable to charge the plaintiff, as the responsible party for depriving the innocent defendant of his property without cause. *Weston* v. *Watts* (N. Y. 1887) 45 Hun 219. The same principle is also applicable in the case of an attachment. *Bowe* v. *U. S. Reflector Co.* (N. Y. 1885) 36 Hun 407. This latter view seems preferable. and the one most likely to promote justice. The defendant receives his property intact and the receiver may be fully protected, in case of the plaintiff's insolvency, by a bond, as provided for by statute, *Dreyspring Admr.* v. *Loeb* (1896) 113 Ala. 263, or, in the absence of statute, by the court, or by the receiver himself as a condition of his acceptance. *Weston* v. *Watts*

*supra.* The principal case is not in accord with New York law. *Pittsfield Nat. Bank* v. *Bayne supra.*

REMAINDERS—DOUBLE POSSIBILITIES.—In a marriage settlement land was assured to X in trust, after the death of the survivor of the husband and wife, for such children or grandchildren born in the lifetime of the husband as he should appoint. By his will he appointed a moiety in trust for a daughter, unborn at the date of the settlement, for life, and after her death in trust for her two children. *Held,* the remainder to the children, following a remainder to the parent, unborn at the date of the settlement, was void, being a possibility on a possibility. *In re Nash* (1909) L. R. 78 Ch. Div. 657. See Notes, p. 724.

STATUTES—CUMULATIVE PENALTIES—SEPARATE OFFENSES.—The defendant manufactured and offered for sale in two lots 138 barrels of vinegar, each of which was branded "pure cider vinegar." On inspection of fifteen barrels they were found to be unlawfully so branded. Under a statute providing a penalty for each offense, the state brought action for fifteen penalties. *Held,* McLennan P. J. dissenting, the action could be maintained. *People* v. *Albion Cider & Vinegar Co.* (1909) 118 N. Y. Supp. 15.

Generally, in civil actions, when a statute does not provide for cumulative penalties in so many words, the courts refuse to interpret it as providing for them, on the ground that the purpose of the statute while punitive, is nevertheless remedial, and that therefore it would be contrary to the legislative intention to allow the plaintiff by delaying his action to increase the number of penalties which he is entitled to recover. *U. S. Condensed Milk Co.* v. *Smith* (N. Y. 1906) 116 App. Div. 15; *Griffin* v. *Interurban Ry. Co.* (1904) 179 N. Y. 438. But in criminal prosecutions, since the purpose of the statute is merely to inflict punishment, it is construed strictly, and cumulative penalties are allowed; *State* v. *Small* (1860) 31 Mo. 197; *People* v. *N. Y. etc. R. R. Co.* (N. Y. 1855) 25 Barb. 199; but since they are looked upon with disfavor the definition of a separate offense is generally very broad. *Standard Oil Co.* v. *United States* (1908) 164 Fed. 376; *Sturgis* v. *Spofford* (1871) 45 N. Y. 446. In the principal case, the construction of the court seems in accord with the strict language of § 52 (N. Y. Laws 1893, p. 667 c. 338). Had the suit, however, been brought for the violation of § 51 (N. Y. Laws 1893, p. 667 c. 338), making unlawful the sale of adulterated vinegar, only two penalties could have been recovered; *Standard Oil Co.* v. *United States supra;* and as urged in the dissenting opinion, it may be argued that §§ 51 and 52 are so closely related as to show a legislative intent to make the unlawful branding, as well as the unlawful sale, of adulterated vinegar apply only to specific transactions.

TORTS—DEFENSE OF PROPERTY BY DEADLY APPLIANCES.—Defendant, the owner of a storehouse containing valuable goods, placed a spring-gun therein to protect it from burglars. The plaintiff, while breaking in to steal, discharged the gun and was injured. *Held,* the owner was not liable in trespass. *Scheuermann* v. *Scharfenberg* (Ala. 1909) 50 So. 335. See Notes, p. 720.

TORTS—LOOK AND LISTEN RULE—COURT AND JURY.—The plaintiff was struck at a crossing on a foggy evening, by a train showing no lights, and when another train was passing at the same time. He testified that he stopped and looked. *Held,* Amidon J. dissenting, the plaintiff's testimony was negatived by the evidence, and he was guilty of contributory negligence as a matter of law. *St. L. & S. F. R. Co.* v. *Cundieff* (1909) 171 Fed. 319.

It is the function of the court to keep the jury within rational bounds in giving its verdicts, *Pleasants* v. *Fant* (U. S. 1874) 22 Wall. 116, so that where there is no evidence or a mere scintilla, *Hathaway* v. *E. Tenn. etc. R. R.* (1886) 29 Fed. 489, or the evidence is undisputed and but one reasonable inference can be drawn therefrom, *Pleasants* v. *Fant supra,* it is proper for the court to direct a verdict. But the power to direct, is not

coextensive with the power to set aside a verdict. *McDonald* v. *Met. St. Ry. Co.* (1901) 167 N. Y. 66. Subject to these limitations, the question of reasonable conduct as determining negligence is left to the jury. *Patton* v. *So. Ry. Co.* (1897) 82 Fed. 979; but see *Lorenzo* v. *Wirth* (1898) 170 Mass. 596. In formulating the look and listen rule, the courts, originally exercising their supervisory powers, *Steves* v. *Oswego & S. R. Co.* (1858) 18 N. Y. 422, have encroached on the province of the jury, *Rodrian* v. *N. Y. etc. R. R. Co.* (1891) 125 N. Y. 526, by force of successive adjudications of fact perhaps, see Wigmore, Evidence § 2552, such adjudications acquiring the force of precedent, in so far as followed in subsequent decisions. By the weight of authority, the rule applies only where but one reasonable inference can be drawn, *Terre Haute etc. R. R. Co.* v. *Voelker* (1889) 129 Ill. 540, and where from the evidence, the plaintiff must have avoided the accident had he looked and listened. *North Pac. R. R. Co.* v. *Freeman* (1899) 174 U. S. 379. But obviously, the test is elastic, for on theory it is always possible for the court to say that only one reasonable inference can be drawn. See *Patton* v. *So. Ry. Co. supra.* Were this broad view taken, the question of negligence would always be for the court, where the facts are undisputed. *Lorenzo* v. *Wirth supra.* The decision in the principal case seems to show such a tendency.

WATERS AND WATER COURSES—NON-NAVIGABLE LAKES—TITLE AS BETWEEN THE STATE AND THE UNITED STATES.—The state of Iowa conveyed to the defendant land bordering upon a non-navigable lake. No patent conferring legal title to the land or lake bed had ever issued to the state from the federal government. *Held,* the state had sufficient title to enjoin the defendant from draining the lake. *State* v. *Jones* (Ia. 1909) 122 N. W. 241.

Title to the beds of navigable waters passes from the United States to a state upon its admission to the Union. *Barney* v. *Keokuk* (1876) 94 U. S. 324. When, therefore, land bordering on navigable waters is granted to individuals by the United States, if the land under the water also passes to the grantee it is not by virtue of the patent alone, but because the state which owns it so declares. *Harden* v. *Shedd* (1902) 190 U. S. 508. Title to the beds of non-navigable waters, however, does not pass to the state upon admission to the Union. Nevertheless, when the United States grants land bordering on such waters to individuals, the law is well settled that it is divested of title to the beds, which becomes either the property of the individual, *Clute* v. *Fisher* (1887) 65 Mich. 48, or the state, *Fuller* v. *Shedd* (1896) 161 Ill. 462, the question to be determined by the state law. *Hardin* v. *Jordan* (1890) 140 U. S. 371. Where the state law, as in Iowa, *Wright* v. *Council Bluffs* (1906) 130 Ia. 274, declares that the grantee gets no title in the bed, the state is therefore given power to appropriate the property of the United States. *Hardin* v. *Shedd supra* at 523 (dissenting opinion). This doctrine is a peculiar one at best and should not be extended. In the principal case, a conveyance of the bordering lands by the state which admittedly had no title to them, is regarded as equivalent to a valid conveyance by the United States so as to bring the case within the rule. Such an extension would hardly seem justifiable.

WITNESSES—ATTESTATION—COMPETENCY OF INTERESTED PARTIES.—The plaintiffs sued on a lease acquired by an assignment made by one of the plaintiffs to himself and the other plaintiffs, two of whom were attesting witnesses. *Held,* the attestation was valid. *Halla* v. *Cowden* (1909) 170 Fed. 559.

The common law did not require deeds to be attested. 2 Bl. Com. 307. Where this is required by statute, and the common law rule disqualifying interested parties from testifying prevails, since the chief function of an attesting witness is to testify, it follows that an interested party cannot attest a deed. *Child* v. *Baker* (1888) 24 Neb. 188; 1 Devlin, Deeds § 259; but see *Johnson* v. *Turner* (1840) 7 Ohio (pt. 2) 216. The privilege arising from coverture gives rise to an analogous situation to-day, and debars one spouse from attesting an instrument to which the other is a party. *Bank* v. *O'Brien* (1894) 94 Tenn. 38. Where the rule disqualifying interested

parties from testifying is in effect, when a statute requiring attestation is passed, its subsequent abrogation does not affect attestation. *Coleman* v. *State* (1885) 79 Ala. 49; *Winsted Bank* v. *Spencer* (1857) 26 Conn. 195. The principal case, however, arises in a jurisdiction where at the time of the passing of the statute, interest did not debar a person from testifying. The better view, under such circumstances, seems to be that a party to a deed should be incompetent to attest it, as the law in requiring attesting witnesses contemplates a means of procuring additional testimony. *Seal* v. *Clarigge* (1881) L. R. 7 Q. B. D. 516. In failing to take this into consideration, the court, in the principal case, appears to fall into error. Whether or not the disqualification would be extended to interested parties other than grantor or grantee, is an open question in most jurisdictions. A decision in the negative, however, would seem preferable, as such witnesses would furnish additional testimony, and the objection that the idea of disinterestedness should be inseparably coupled with that of attestation so as to discourage perjury, is not insurmountable.

WITNESSES—ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.—The plaintiff offered the evidence of an attorney to show that deeds executed by the defendant with the advice of the attorney, were in fraud of creditors. *Held,* the evidence was admissible. *Stone* v. *Stitt* (Tex. 1909) 121 S. W. 187.

The principle of privilege as applied to communications between attorney and client is well recognized, 6 COLUMBIA LAW REVIEW 191, and the policy of the underlying reasons is uniformly approved, namely, to afford the client the fullest protection of his rights, *Greenough* v. *Gaskell* (1833) 1 My. & K. 98, so that where a client presents to his attorney the history of his cause, however reprehensible his conduct may have been, a typical case of privilege is presented. *Alexander* v. *United States* (1891) 138 U. S. 353. But where advice is sought with respect to future wrongdoing, the privilege is denied, *Matthews* v. *Hoagland* (1891) 48 N. J. Eq. 455, uniformly, with respect to the commission of crimes, *In re Cole* (1879) Fed. Cas. No. 2975; see *State* v. *Barrows* (1885) 52 Conn. 323, and generally, with respect to the commission of civil wrong, *Hamil & Co.* v. *England* (1892) 50 Mo. App. 338; *contra, Supplee* v. *Hall* (1902) 75 Conn. 17, the theory being that where the attorney is apprised of the nature of the communication, whether becoming a party to it or not, the matter is not within the scope of his professional employment, *Dudley* v. *Beck* (1854) 3 Wis. 274, and where he is not, the communications are not made in confidence, *State* v. *Kidd* (1893) 89 Ia. 54, and so not within the privilege. It has been suggested that this limitation should apply only to cases where the party is tried for the crime in furtherance of which the communication was made. *Alexander* v. *United States supra.* In civil cases, the privilege has been denied where the fraud is in issue, *Matthews* v. *Hoagland supra,* but where the fraud is indistinctly indicated, *Higby* v. *Dresser* (1870) 103 Mass. 523, or does not appear on the face of the pleadings, *Follett* v. *Jefferyes* (1850) 1 Sim. [N. S.] 1, it has been sustained. The matter is really one for the discretion of the court upon consideration of all the circumstances, *Queen* v. *Cox & Railton* (1884) L. R. 14 Q. B. D. 153, and so should be exercised with caution. See *Rex* v. *Haydn* (1825) 2 F. & S. 379. Since fraud is in issue in the principal case, the decision is sound.